INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of argument	7
Argument:	
I. There was no taking for public use of the appellant's right to possession of the coal shipped by it, and if there had been such taking appellant's remedy would have been in the district courts and not in the Court of Claims	7
II. No agreement by the United States that the appellant should receive proper credit for coal shipped by it can be implied	12
Conclusion	14

CITATIONS

Bedding Co. v. *United States*, 266 U. S. 491	9
Bothwell v. *United States*, 254 U. S. 231	13
Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146	13
Houston Coal Co. v. *United States*, 262 U. S. 361	9
Interocean Oil Co. v. *United States*, 270 U. S. 65	13
Merritt v. *United States*, 267 U. S. 338	10
Morrisdale Coal Co. v. *United States*, 259 U. S. 188	13
Omnia Co. v. *United States*, 261 U. S. 502	13
Pine Hill Co. v. *United States*, 259 U. S. 191	13
Sutton v. *United States*, 256 U. S. 575	12
United States v. *North American Co.*, 253 U. S. 330	12
United States v. *Pfitsch*, 256 U. S. 547	8, 9
Act of August 10, 1917 (Lever Act), c. 53, sec. 10, 40 Stat. 276, 279	2, 3
Executive order of August 23, 1917	4

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 17

WILLIAM C. ATWATER & COMPANY, INCORPORATED, Appellant

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 11–13) is reported in 60 Ct. Cls. 323.

JURISDICTION

The judgment of the Court of Claims, sustaining a demurrer to the appellant's amended petition and dismissing the petition, was entered February 9, 1925. (R. 13.) A motion for a new trial was filed on April 10, 1925, duly entertained, and overruled on May 4, 1925, and the petition for appeal was filed on May 7, 1925. (R. 13.) Jurisdiction of this Court is invoked under Sections 242 and 243 of the

Judicial Code as they stood prior to the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether the shipment of coal by the appellant to the Tidewater Coal Exchange, an unincorporated association of shippers of bituminous coal, pursuant to regulations of the United States Fuel Administrator requiring every shipper of bituminous coal for transshipment at any one of certain ports to consign all such shipments of coal to said Tidewater Coal Exchange, and the failure of the Tidewater Coal Exchange to credit the appellant promptly with certain shipments so made, give rise to an implied agreement on the part of the United States, enforcible in the Court of Claims, to reimburse the appellant for the loss caused by such delay.

STATUTE INVOLVED

Section 10 of the Lever Act (c. 53, 40 Stat. 276, 279) provides in part as follows:

> That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person

> shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies * * *.

STATEMENT

In June, 1917, an unincorporated association of shippers of bituminous coal to the tide-water ports of Hampton Roads, Baltimore, Philadelphia, and New York was organized and known as the Tide-water Coal Exchange. The general purpose of the association was to expedite the transshipment of coal from cars to boats at the above-mentioned ports and thus release rolling stock which would be made available to move a larger amount of coal. (R. 1.)

The organizers of the Exchange on June 20, 1917, adopted rules for its management and operation (R. 1), and a copy of said rules was attached to the appellant's amended petition (R. 7–11). It appears from these rules that the Exchange was a pooling arrangement under which shippers of coal of the same grade and classification were to pool their coal and each shipper was to load vessels with coal from a pool in which he had credit, but not necessarily with the specific coal shipped by him. The function of the Exchange was merely to keep

a record of credits in and withdrawals from the various consigning pools, to apportion demurrage, etc., and each member was responsible for providing vessels in which to transport the coal to his credit in the consigning pools.

On or about November 6, 1917, the United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States dated August 23, 1917, appointing said Administrator, and in furtherance of the purpose of said order and of the Act of Congress therein referred to and approved August 10, 1917 (the Lever Act, c. 53, 40 Stat. 276), issued an order (R. 2), a copy of which was attached to the appellant's amended petition (R. 4–7).

Said order recited, among other things, that it appeared to the Fuel Administrator that the production of coal intended for transshipment at the tidewater ports of Hampton Roads, Baltimore, Philadelphia, and New York, and ports near or usually considered as tributary to said ports, was being restricted, and that the loading of coal-carrying vessels and the unloading of coal cars at such ports and the movement, arrival, and return of such vessels and cars at and from such ports was congested and delayed by reason of the continuance of individual shipments of coal by various producers upon the lines of coal-carrying roads having terminal at the ports aforesaid, and of individual and distinct transshipments of such coal at such ports only to coal-carrying vessels specially chartered or

designated for the transshipment thereat of such individual shipments, and that the objectionable conditions could be largely eliminated by the employment of and cooperation with a common agency at each transshipment point. (R. 4–5.)

The order provided, among other things, that every shipper of bituminous coal for transshipment at any one of the ports at Hampton Roads, Baltimore, Philadelphia, and New York, and ports near or usually considered as tributary to said ports, should, on and after November 11, 1917, consign all such shipments of coal to the Tidewater Coal Exchange; that such shipments and consignments should be made by each such shipper in accordance with and subject to the provisions of the existing Tidewater Coal Exchange rules in the same way, to the same extent, and with the same rights and liabilities respecting such shipments and the transshipment and delivery of the coal included therein as under the terms of said rules applied to members of the Tidewater Coal Exchange. (R. 5–6.)

At divers times subsequent to November 11, 1917, and prior to December 5, 1918, the appellant shipped certain bituminous coal consigned to the Tidewater Coal Exchange in accordance with the terms of the order of the Fuel Administrator, but, according to the appellant's amended petition (R. 3):

> * * * the defendant, acting through said United States Fuel Administrator, its duly authorized representative, withheld

> from and failed to credit your claimant with coal shipped by your claimant to said Tidewater Coal Exchange as aforesaid to the aggregate amount of 34,143 net tons, * * * and did not credit your claimant therewith until December 5th, 1918, on which date said Fuel Administrator increased the amount of your claimant's coal credits by the said 34,143 net tons * * *.

The amended petition alleges that during the period subsequent to November 11, 1917, and prior to December 5, 1918, there was a ready and constant demand and market for coal at Hampton Roads, where the aforesaid coal was shipped by the appellant; that after December 5, 1918, there was practically no market whatever for a large portion of the coal withheld from the appellant, and that the appellant sold such coal at prices much lower than those prevailing prior to December 5, 1918. The amended petition claims damages or compensation based on the difference between the market price of the coal during the period when the appellant was entitled to credit for the coal under the rules of the Tidewater Coal Exchange and the prices obtained by it after the coal was credited to it on December 5, 1918.

The petition alleges as a first cause of action that the appellant's claim is founded upon the Fifth Amendment to the Constitution of the United States, and as a second cause of action that the appellant's claim is founded upon an implied contract.

SUMMARY OF ARGUMENT

If there was any taking of the appellant's right to the possession of its coal, such taking must have been under Section 10 of the Lever Act, and the appellant's remedy was in the District Courts, not in the Court of Claims. But there was no such taking by the United States for public use. The failure to credit the appellant with the coal shipped by it was the act of the Tidewater Coal Exchange alone. There are no allegations of fact in the petition indicating that the Exchange took the right to possession of the coal for public use. Moreover, the Exchange had no authority to requisition the coal or the right to its possession on behalf of the United States.

In the absence of a taking by the United States for public use, no agreement by the United States that the appellant should receive proper credit for coal shipped by it to the Tidewater Coal Exchange can be implied.

ARGUMENT

I

THERE WAS NO TAKING FOR PUBLIC USE OF THE APPELLANT'S RIGHT TO POSSESSION OF THE COAL SHIPPED BY IT, AND IF THERE HAD BEEN SUCH TAKING APPELLANT'S REMEDY WOULD HAVE BEEN IN THE DISTRICT COURTS AND NOT IN THE COURT OF CLAIMS

The appellant's first cause of action is based upon the theory that the United States took for public use and without any claim of ownership

the appellant's right to dispose of its coal, and that there was, therefore, an implied promise by the United States to pay just compensation for the property right so taken. It is admitted that the United States did not consume the coal, and that only the right of possession, if anything, was taken; and it is also admitted that neither the order of the Fuel Administrator that all coal shipped to certain ports should be consigned to the Tidewater Coal Exchange, nor the shipment of the coal so consigned, constituted a taking of the coal. The appellant's contention is that the taking took place when, upon arrival at the Tidewater Coal Exchange of the appellant's coal, credit for an equivalent amount of coal and delivery of the same was withheld from the appellant.

It seems clear, in the first place, that if there was any taking of the appellant's right to the possession of its coal, such taking must have been under Section 10 of the Lever Act (Act August 10, 1917, c. 53, 40 Stat. 276, 279) which authorized the President "to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense," and required him to ascertain and pay a just compensation therefor. Therefore the appellant's petition was properly dismissed by the Court of Claims, for this Court has decided that the District Courts have exclusive jurisdiction of controversies arising under Section 10 of the Lever Act. *United States* v.

Pfitsch, 256 U. S. 547; *Houston Coal Company* v. *United States,* 262 U. S. 361; *Bedding Co.* v. *United States,* 266 U. S. 491.

A second obstacle to recovery by the appellant on the theory that there was a taking of its right to possession of the coal shipped by it, or an equivalent amount of similar coal, is that the petition contains absolutely no allegations of fact showing any taking by the United States for public use. All that appears is that the appellant shipped certain coal to the Tidewater Coal Exchange and that some one "withheld from and failed to credit" the appellant with such coal as promptly as should have been the case. It is true that the petition alleges that this some one was "the defendant, acting through said United States Fuel Administrator, its duly authorized representative," but this allegation is manifestly no more than a statement of the appellant's conclusion that the failure of the Tidewater Coal Exchange to give proper credit was the failure of the United States. It is apparent that the failure to credit the appellant with the coal shipped by it was the act of the Tidewater Coal Exchange, and not of any officer or agent of the United States unless the Tidewater Coal Exchange can be regarded as such agent. The only fact set forth in the amended petition tending in any way to connect the United States with the transaction of which the appellant complains is the issuance by the Fuel Administrator of the order requiring shipments to the Tidewater Coal Exchange.

Under these circumstances two difficulties face the appellant. The first is that even if the Tidewater Coal Exchange had authority to requisition coal, or the right to its possession, on behalf of the United States, it does not appear that it took any such action for public use with respect to the appellant's coal. The failure to give the appellant proper credit may have been, and probably was, the result merely of negligence on the part of some employee of the Tidewater Coal Exchange. At any rate, there is absolutely nothing in the petition from which it can be inferred that there was, or that anybody thought there was, any benefit to the United States to be derived from the failure to give the appellant proper credit, or that the Tidewater Coal Exchange or any employee or agent thereof ever attempted to obtain any such benefit for the United States. It is clearly impossible for any court to remedy the lack of allegations of fact in the petition by speculation, such as the appellant indulges in, that the Fuel Administrator, even though he did not requisition the appellant's coal, failed to give the appellant proper credit in order that he might at all times have sufficient coal at the Tidewater Coal Exchange for requisition in case of need. As stated in *Merritt* v. *United States,* 267 U. S. 338, on page 341:

> The practice of the Court of Claims, while liberal, does not allow a general statement of claim in analogy to the common counts. It requires a plain, concise statement of the facts relied upon.

That the Tidewater Coal Exchange had no power to requisition coal or the right to its possession on behalf of the United States seems equally clear. The Exchange was originally merely a cooperative organization for the purpose of facilitating the handling of coal by its members. The Exchange had nothing to do with selling or disposing of coal or with furnishing vessels on which to transport it. Each member disposed of his coal and furnished vessels to transport it in exactly the same manner as he would have done if the Exchange had not been in existence; the only effect of consigning the coal to the Exchange was that when it came time for a member to deliver coal to a vessel, delivery was not necessarily made from the specific coal which that member had shipped to the Exchange, but was completed by placing upon the vessel an equivalent amount of similar coal. The order of the Fuel Administrator did no more than to compel nonmembers of the Tidewater Coal Exchange, if they wished to ship coal at any of the ports at which it operated, to use the machinery which the members had already adopted. The terms of the order make it clear that it contemplated only pooling of coal to facilitate disposition thereof by shippers, not any taking or other interference with the right of a shipper to dispose of coal equivalent in amount to that shipped by him. Moreover, the order specifically provided that shipments should be made "in accordance with and subject to the provisions of the existing Tidewater Coal Exchange rules in the same

way, to the same extent, and with the same rights and liabilities respecting such shipments and the transshipment and delivery of the coal included therein, as under the terms of said rules apply to members of said Tidewater Coal Exchange." Prior to the order of the Fuel Administrator it is obvious that the Exchange would have had no right whatsoever to withhold or take coal from any member, and the order does not contain a word which would even suggest that the Fuel Administrator intended to enlarge the power of the Exchange in this respect. It is true that the order appointed the Commissioner of the Tidewater Coal Exchange as the representative of the Fuel Administrator "to carry out the provisions of this order," but, of course, this did not give the Commissioner any power more extensive than to enforce the other provisions of the order.

It follows that, if there were any taking of the appellant's right to possession of the coal shipped by it, such taking was entirely unauthorized and the United States is not liable. *United States* v. *North American Co.*, 253 U. S. 330, 333; *Sutton* v. *United States*, 256 U. S. 575, 580.

II

NO AGREEMENT BY THE UNITED STATES THAT THE APPELLANT SHOULD RECEIVE PROPER CREDIT FOR COAL SHIPPED BY IT CAN BE IMPLIED

As an alternative theory upon which to base its claim the appellant alleged as a second cause of action in its amended petition, and contends in Point

III of its brief in this Court, that by virtue of the terms of the order of the Fuel Administrator and the rules of the Tidewater Coal Exchange the United States agreed that the appellant should be properly credited with all coal shipped under the terms of said order. The appellant argues that such an agreement is necessarily to be implied from the facts and does not depend upon any taking by the United States.

In effect the agreement by the United States for which the appellant contends would be one to indemnify all shippers of coal to the Tidewater Coal Exchange against any loss resulting from errors or malfeasance in the operation of the Exchange. The contention does not merit extended discussion. The appellant does not refer to any statute authorizing the assumption of so extraordinary a liability. Moreover, in a number of cases this Court has refused to imply any contract subjecting the United States to obligation unless there is a taking by the United States for public use.

Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146.

Bothwell v. *United States*, 254 U. S. 231.

Morrisdale Coal Co. v. *United States*, 259 U. S. 188.

Pine Hill Co. v. *United States*, 259 U. S. 191.

Omnia Co. v. *United States*, 261 U. S. 502.

Interocean Oil Co. v. *United States*, 270 U. S. 65.

In addition it may perhaps be worth while to point out that Paragraph 15 of the rules of the

Tidewater Coal Exchange provided that controversies with reference to the operation of the Exchange which could not be adjusted by the Commissioner should be submitted to the executive committee and the proper railroad committee in joint session, and that their decison should be final, and that Paragraph (3) of the order of the Fuel Administrator specifically recognized such method of settling controversies, and provided that if any such settlement was unsatisfactory to any shipper subject to the provisions of the order, such shipper might appeal to the United States Fuel Administrator. There is no allegation in the petition that the appellant made any attempt to settle its controversy with the Tidewater Coal Exchange in the manner thus provided. If the United States made any contract to indemnify shippers against loss resulting from the operation of the Tidewater Coal Exchange, there can be no doubt that indemnity was to be conditioned upon settlement of the controversy in the manner expressly provided by the rules of the Exchange and the order of the Fuel Administrator.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.
GARDNER P. LLOYD,
Special Assistant to the Attorney General.

OCTOBER, 1927.

○